

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

THE MAGNAVOX COMPANY,)
a Corporation, and)
SANDERS ASSOCIATES, INC.,)
a Corporation,)
Plaintiffs,)
v.)
BALLY MANUFACTURING CORPORATION,)
a Corporation, CHICAGO DYNAMIC)
INDUSTRIES, INC., a Corporation,)
EMPIRE DISTRIBUTING, INC., a)
Corporation, MIDWAY MFG. CO., a)
Corporation, SEEBURG INDUSTRIES,)
INC., a Corporation, THE SEEBURG)
CORPORATION OF DELAWARE, a)
Corporation, WILLIAMS ELECTRONICS,)
INC., a Corporation, and WORLD WIDE)
DISTRIBUTORS, INC., a Corporation,)
Defendants.)

RECEIVED
CONSOLIDATED
CIVIL ACTION NOS.
DEC 13 1974
74 C 1030
74 C 2510

JUDGE PRENTICE E. MARSHALL

MEMORANDUM IN SUPPORT OF MOTION BY
DEFENDANT BALLY MANUFACTURING CORPORATION

Defendant, Bally Manufacturing Corporation ("Bally"), on November 27, 1974, moved this Court, pursuant to Rule 56 F.R.C.P. for summary judgment in its favor dismissing plaintiffs' First Amended Complaint for Patent Infringement against this defendant. The motion was made on the grounds that defendant Bally neither makes, uses nor sells any of the accused video devices, and no genuine issue as to any material fact exists on this point.

Plaintiffs' First Amended Complaint for Patent Infringement asserts certain patent rights against Bally for the alleged infringement of U.S. Patents 3,659,284 and 3,659,285 on "Television Gaming Apparatus" by making, using and selling certain

accused television game apparatus embodying the subject matter of the claims of said patent, and/or by selling such game apparatus manufactured by others and embodying such subject matter.

The subject matter of the claims of the two patents in suit are directed to certain types of game apparatus employing a television or cathode-ray tube and wherein the positions of various spots on the screen of the tube are manipulated by the players through suitable controls to intercept a moving spot which may simulate a ball, puck or other moving object, depending on the type of game being played. Plaintiffs contend that an example of such apparatus employing the claimed subject matter of the patents is the device sold commercially by plaintiff Magnavox under the tradename "Odyssey". The Odyssey device is adapted to be connected to the antenna terminals of a television receiver and provides the electronic control system and operator controls to display the desired game on the T.V. screen and to permit playing thereof by the players.

While the claimed subject matter includes the combination of a number of elements or means which are alleged to cooperate to provide the ultimate result of the apparatus, at the very least all of the claims in the patents in suit require that the apparatus incorporate therein, or be particularly used with, a television receiver or a cathode-ray tube. As shown by the attached Affidavit of John A. Britz (Exhibit A), the Executive Vice-President of Bally, so-called T.V. or video games

have been made and/or sold by wholly owned subsidiaries of Bally, namely, Midway Mfg. Co. and Empire Distributing, Inc., both of which are also defendants in this suit. However, Bally has never made, sold or used any such games, and in particular, has never made, sold or used any T.V. games or video games to be used with a television receiver or a cathode-ray tube. While Bally, as the parent corporation, did receive on two occasions in 1973 an order for video apparatus sold by Midway, and for convenience obtained the apparatus from Midway and shipped it to the customer together with the Bally equipment, the payment for the video games was merely passed back to Midway, and thus this was effectively a sale by Midway and not Bally of such video apparatus.

Although plaintiffs' counsel at the status call on November 29 in discussing this motion alluded to a Bally agreement which related to video amusement games, as shown by the Britz Affidavit (Paragraph 5) Bally did enter into an agreement dated June 26, 1972 with Noland Bushnell, a designer of coin-operated amusement devices, for the design of a prototype video amusement game as well as a "flipper" type pinball machine and paid a fixed sum for this development work, but Bally never approved or accepted the prototype of the video games which were brought to Bally pursuant to the agreement and Bally decided not to manufacture or sell such video games. This was also the testimony of Mr. Britz at his deposition taken on June 25, 1974 by plaintiffs in this action, a copy of that agreement being marked as Exhibit 3 in the deposition of Henry

Ross, an officer of defendant Midway Mfg. Co., also taken on June 25, 1974 by plaintiffs.

For the above reasons it is submitted that there is no genuine issue of material fact and it is clear that there is no infringement by Bally of the patents in suit as charged in plaintiffs' First Amended Complaint for Patent Infringement, and that Bally is entitled to judgment of dismissal as a matter of law.



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BALLY MANUFACTURING CORPORATION,) 74 C 1030
a Corporation, et al.,) 74 C 2510
Defendants.)

AFFIDAVIT OF JOHN A. BRITZ

JOHN A. BRITZ, being duly sworn, deposes and
says that to the best of his information and belief:

1. He is the Executive Vice-President of Bally
Manufacturing Corporation, (hereinafter referred to as "Bally"),
a defendant in the above-captioned action, and has been a
Vice-President of Bally since approximately 1968.

2. He is informed that plaintiffs, The Magnavox
Company and Sanders Associates, Inc., in this action are
asserting certain patent rights against Bally for the alleged
infringement of U.S. Patents 3,659,284 and 3,659,285 on
"Television Gaming Apparatus", by making, using and selling
certain accused television game apparatus embodying the sub-
ject matter of the claims of said patents, and/or by selling
such game apparatus manufactured by others and embodying
such subject matter.

EX 2

3. He is informed that all such accused television game apparatus under said patents necessarily incorporates therein, or is to be particularly used with, a television receiver or a cathode-ray tube, such apparatus being customarily referred to in the coin-operated game industry as "T.V. games" or "Video games".

4. While so-called T.V. or video games have been made and/or sold by wholly owned subsidiaries of Bally, viz., defendants Midway Mfg. Co. and Empire Distributing, Inc., Bally has never made, sold or used any such games, and, in particular, has never made, sold or used any television game apparatus incorporating therein, or to be used with a television receiver or a cathode-ray tube.

5. On two occasions in 1973 Bally received orders for video games of the type sold by Midway together with non-video games of the type made by Bally. As a matter of convenience Bally obtained the games from Midway and then shipped them to the customers together with the non-video games of Bally. These video games were charged by Midway to Bally at the full resale price and Bally billed the customers at that same resale price and credited that amount to Midway, making no profit on the transactions, so that they were, in effect, sales by Midway.

6. Although Bally had entered into an agreement

dated June 26, 1972 with Noland Bushnell, a designer of coin-operated amusement devices, for the design of a prototype video amusement game as well as a "flipper" type pinball machine, and had fully paid a fixed sum therefor, Bally never approved or accepted the prototypes of the video games which were brought to Bally pursuant to said agreement, and Bally decided not to manufacture or sell such video games.

John A. Brey
Vice Pres.

STATE OF ILLINOIS)
COUNTY OF COOK)

Subscribed and sworn to before me in Chicago,
Illinois, this 13rd day of December, 1974.

Ralph H. Wait
Notary Public - My Commission
Expires: July 1, 1975

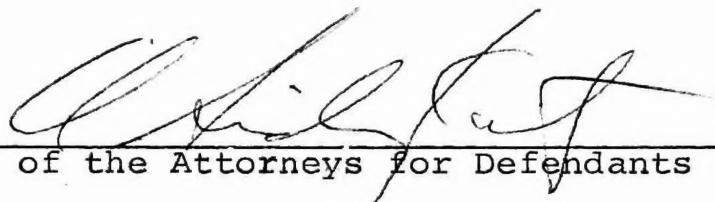
CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing MEMORANDUM IN SUPPORT OF MOTION BY DEFENDANT BALLY MANUFACTURING CORPORATION and AFFIDAVIT OF JOHN A. BRITZ were served by first class mail, postage prepaid, on December 13, 1974 to the following:

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